(14)

No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER and ROBERT BRILL,
Petitioners,

vs.

IRIS MENA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the jury and district court erred by finding that petitioners violated the Fourth Amendment where the trial record shows that petitioners, inter alia, detained respondent in handcuffs for at least 15 minutes after the search ended, detained respondent in uncomfortable handcuffs for more than two hours without a law enforcement justification, and questioned respondent on the irrelevant subject of her immigration and citizenship status?

2. Whether the questioning of a lawfully detained individual about matters unrelated to the purpose of the detention and without probable cause or reasonable suspicion to believe the detainee engaged in the criminal activity constitutes a separate, unconstitutional "seizure" under the Fourth Amendment?

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The opinion of the court of appeals (Pet. App. 1a-108a) is reported at 332 F. 3d 1255 (9th Cir. 2003). The district court's judgment is unreported. Pet. App. 48a–54a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Introduction

The Fourth Amendment does not generally provide for arrests incident to searches, even a search authorized by a valid search warrant. This Court in *Michigan v. Summers*, 452 U.S. 692 (1981), did not authorize routine handcuffing or irrelevant interrogation of *Summers* detainees, nor did this Court approve the exceptional restraint on their liberty represented by a detention without a showing of probable cause. To accept these new principles, as petitioners ask this Court to do, would transform Fourth Amendment jurisprudence in a manner that unjustifiably erodes American freedoms.

The jury in this case, under proper instructions,[1] found that Iris Mena had been subjected to an unreasonable detention accompanied by the use of more force than was reasonable in the totality of circumstances. J.A. 255-256. There was ample

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[1] Petitioners do not challenge these jury instructions in this Court. Nor do petitioners challenge the jury's award of punitive damages against them and thus they do not challenge the jury's finding that petitioners acted with deliberate indifference to Ms. Mena's constitutional rights.

justification for this verdict in the trial record and the findings represented by the jury's verdict are entitled to deference.

Iris Mena, who was never a target of any police interest (J.A. 61), was kept in handcuffs for up to three hours in a cold, converted garage. J.A. 61, 71-72, 74, 105, 146. She was taken through pouring rain, without adequate clothing, to that garage. J.A. 103-103. She was handcuffed up to one hour after the search had been completed and without justification. J.A. 69, 75, 186-188.

After the first few minutes of this police operation it was clear that there was no justification for keeping Ms. Mena in handcuffs given the overwhelming force available to the petitioners and the absence of any evidence that any of the people the police found had committed any crimes or were in any way involved with the target of the police raid. There were no armed gang members at the scene.

Other officers actually found the target of these police operations, Raymond Romero, at his mother's nearby home at the same time the Mena search began. At that location, Mr. Romero was allowed to leave the premises after a brief detention and the receipt of a citation. J.A. 154-155. Given this disparity in treatment between Ms. Mena and Mr. Romero, it is not surprising that the jury dismissed petitioners' unsupported claims of justification and instead awarded punitive damages against them.

Petitioners' brief relies upon a version of the facts the jury rejected, as it had every right to do. Petitioners' arguments can be sustained only by viewing the evidence in this case in the light most favorable to them. This approach is not only at odds with the essential appellate function; it would be a violation of Ms. Mena's right to a jury trial. The jury in this case performed the vital function of evaluating the officers' claimed justifications and ensuring that residents in the City of

Simi Valley were not subjected to the abuse of power and discrimination that occurred in the course of this operation.[2]

B. Statement of Facts

On February 3, 1998, at approximately 7:00 a.m., no less than eighteen heavily armed officers of the Simi Valley Police Department, including members of the SWAT team, led by petitioners, forcibly gained entry into Iris Mena's home at 1363 Patricia Avenue to execute a search warrant relating to Raymond Romero. J.A. 45, 62-63, 146-147. Mr. Romero, who was not present at the time of the search, was a tenant of Ms. Mena's parents, the owners of the property. J.A. 104, 154.

Within minutes of the initial entry, the SWAT team cleared the residence and established the absence of any threat to the officers. J.A. 147-148. Instead, the officers were confronted with four non-threatening, non-suspects who had nothing whatsoever to do with the suspect, Raymond Romero, or with any criminal activity. J.A. 71, 84, 106, 115-16, 136.

Iris Mena, then eighteen years old (J.A. 97), was asleep in her bedroom located very near the petitioners' point of entry. J.A. 47. She was startled by a loud bang. J.A. 100. Her mother and father were both at work at the time of the search and thus Ms. Mena was alone and vulnerable. J.A. 99-100. The bang was immediately followed by the forced entry of at least one armed man in dark clothing into her locked room. The man pointed a semi-automatic weapon in her face as she awoke and ordered her to stand up and put her hands behind her back.

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[2] The jury also exonerated other officers at the scene and rejected other claims made by the plaintiffs in this case. J.A. 251-255. Thus, it is clear that the jury carefully considered the evidence before it and evaluated that evidence under the instructions provided.

J.A. 100-101. She complied and was grabbed by the hands and pushed face first onto the bed and handcuffed. J.A. 101.

Ms. Mena initially had no idea who the men entering her room were or why they had entered her home. J.A. 101-02. She feared that the men had come to rob or kill her and she was terrified. J.A. 101. She testified that during this initial encounter, no one identified himself as a police officer. J.A. 105, 122, 131. After being handcuffed, Ms. Mena was yanked up by the back of her shirt, pulled off the bed and led out to a converted garage. J.A. 101-02.

Ms. Mena was taken outside in order to reach the garage. Rain was pouring down and the ground was wet and cold. J.A. 103. Ms. Mena was wearing only green sweat pants, a black long sleeved shirt and no shoes. J.A. 102. She was marched through the winter rain with bare feet and no jacket. J.A. 102. Only after she had been exposed to the elements and made to sit in the damp garage in uncomfortable handcuffs for a half an hour to an hour did officers give Ms. Mena a jacket and some shoes to wear. J.A. 106, 114-115, 134.

While Ms. Mena was held in the garage in handcuffs, an officer asked her if she was a legal resident of this country, even though this question was irrelevant to the purpose of the search. J.A. 106. She was not asked for any other form of identification and petitioners had no reason to believe that Ms. Mena was a gang member. An INS officer, who petitioners brought with them on the search (J.A. 159-160), then asked Ms. Mena intrusive questions about her immigration status and demanded to see her papers. J.A. 106. Ms. Mena, a legal resident of this country (J.A. 98, 106), stated that her documentation was in her purse, which was still in her bedroom. A police officer retrieved the purse and searched it without Ms. Mena's permission. The officer handed the

documentation over to the INS agent. J.A. 106-107.[3] It is beyond serious dispute that Ms. Mena was not free to leave the garage at the point when she was asked these questions.

There is no evidence in the record that officers asked Ms. Mena or any of the other residents any questions about Mr. Romero or the West Side Locos, the target of their search. J.A. 76, 176. In fact, Ms. Mena could have assisted officers and reduced the damage officers did to the property and possessions in the house, but she was never asked for any assistance. Ms. Mena could have provided officers, for example, with keys to open the locked doors in the house. J.A. 70, 117, 120-122. Further, at no point did the officers indicate the slightest interest in Ms. Mena as a person with relevant information to Mr. Romero or any other target of their operation. J.A. 76, 194.

There was evidence that the officers went through the house ransacking it and making jokes and laughing about what they were doing. Petitioner Brill commented during the search that the house was "messy" and that his house "wouldn't be kept that way." J.A. 86. Another officer, while laughing, joked how he enjoyed "breaking stuff." J.A.119.

During her detention, while she listened to the destruction of property in the house (J.A. 107), Ms. Mena observed a female videotaping in the garage where she and the other residents were being detained. J.A. 110. Ms. Mena, who had not given the police permission to videotape her, was concerned about this additional intrusion into her privacy. J.A. 110. She asked an officer why she was being videotaped. Instead of alleviating her anxiety and treating her with a modicum of respect, the officer yelled at her that it was part of

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[3]Each of the four persons detained in the garage were questioned about their immigration status. J.A. 137. One person was taken into to custody by the INS as a result of this questioning. J.A. 115-116.

their job to do that, and gave her no further explanation about the videotaping. J.A. 110.

Ms. Mena was the only occupant present within the main house the morning of the search. She was not shown a search warrant or given an explanation for the search until after the search ended. J.A. 105, 122, 131. While she was held, she heard and saw officers breaking things, including a door, in her home, all without the slightest explanation. J.A. 107, 117-118. Ms. Mena made repeated attempts to elicit an explanation for her detention from the officers who were in the garage. J.A. 105. She received either evasive responses or no responses at all. *Id.* On at least one occasion, officers told Ms. Mena that they were not in charge of the operation and hence were not authorized to give her an explanation. J.A. 105. She could hear officers breaking doors and inflicting damage to property in her home, while she was detained in a garage and treated as a person with no rights. J.A. 107, 117-119.

Petitioners Brill and Muehler played a pivotal role in the operation. Petitioners supervised the execution of the search and were also in charge of overseeing the detention of the occupants of the house. J.A. 59, 146-147, 149. It was petitioner Muehler who ordered Ms. Mena and the three other persons found on the property to be taken to the converted garage near the main house. J.A. 153, 172. Petitioner Brill came into the garage several times during Ms. Mena's detention (J.A. 68), and could have released her from her handcuffs at any time. J.A. 72.

Petitioner Muehler acknowledged during trial that he and petitioner Brill were the ones in charge of overseeing the detentions, and that part of this task entailed addressing the questions of the individuals being detained. J.A. 146-147, 149, 176-177, 199-200. Petitioners never approached Ms. Mena to give her an explanation, or to show her a search warrant, even

though petitioners came to the garage during Ms. Mena's detention several times. J.A. 77, 105, 122, 131, 164.

Ms. Mena was detained in the cold garage in handcuffs for the duration of the search. J.A. 71-72. She testified that the handcuffs were "real uncomfortable," and that they became even more uncomfortable as time progressed. J.A. 105-106. Ms. Mena asked officers to remove the handcuffs but she was informed that "it was part of their job" to handcuff her, and that the "their highest officer" had ordered them to do so. J.A. 105. Given the officers' attitude, further requests were clearly futile under the circumstances.[4]

Petitioners justified their treatment of Ms. Mena by claiming they did not know the extent of her involvement with Raymond Romero, the main target of the search, and also claimed a generalized "concern" that she might interfere with the search. J.A. 80-81.[5] Petitioners did not claim that they had any reason to believe that any of the persons they actually found on the premises were connected with a gang or posed any particular threat to the officers. They had absolutely no information that Ms. Mena posed any threat or would interfere with the search if her handcuffs were removed.

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[4] Indeed, it was part of Ms. Mena's case before the jury that petitioners treated respondent so badly because they thought illegal aliens lived at the Mena's home, a home they described as a "poorhouse." J.A. 145. Moreover, petitioners had previously made a call to the Mena residence, though not for any gang affiliated activity. J.A. 80. Thus, the unnecessarily harsh treatment of respondent on the morning of the search could properly have been viewed by the jury as payback for petitioners' prior exposure to the Mena family and petitioners' negative view of the occupants of the Mena home.

[5] Petitioners' assertion that this testimony was "uncontradicted" (Pet. Br. 8) is wrong. Ms. Mena's entire case demonstrated that there was no basis for these unsupported "concerns."

At trial, officers admitted that they did not suspect Ms. Mena of being involved in any crime, and agreed with the observation that she was completely cooperative throughout the entire ordeal. J.A. 65-66, 84, 96, 198. Searches of Ms. Mena's person and room produced no contraband or any evidence of gang membership, or criminal activity of any kind. J.A. 68-69, 82. Petitioners never had any information that Ms. Mena or her family was connected to any gang or criminal activity. J.A. 65-66. Indeed, Ms. Mena was never questioned about any criminal or gang activity or about any subject other than her immigration status. J.A. 76, 194.

Moreover, petitioners knew that this was not a "gang safe house." J.A. 145. Petitioners in their affidavit of probable cause identified respondent's home as a "poorhouse." J.A. 219. Petitioners admitted at trial that on their visit to the location one month prior to the search they encountered several residents but no one who they identified as a gang member. J.A. 56, 179. Petitioners' information was that the only alleged gang member then residing at the home was Raymond Romero.[6] Thus, the claim that the manner in which this search was conducted was due to the concern officers had about who might be present at this location was properly rejected by the jury at trial.

The evidence was that petitioners had adequate personnel at their disposal to remove respondent's handcuffs after they cleared the residence. J.A.150. In fact, within minutes, the search site was deemed Code 4 "which means everything was calm and the risks were minimized." J.A. 147-148. The four detainees were guarded by one or two officers throughout the search.

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[6]Indeed, in the search warrant and affidavit, petitioner Muehler states that he received information that the only other suspected gang member who may have lived at the Mena residence no longer resided there. J.A. 219-220.

Both SWAT Commander Lt. Thomas and defense expert witness Joseph Callanan testified on cross-examination that standard police procedure is that non-suspect detainees, who pose no threat to police officers, should be released after they have been patted down for weapons and identified. J.A. 171-172 (Thomas); J.A. 198-199 (Callanan). Indeed, Mr. Callanan's testimony on cross-examination fully supported Ms. Mena's claim that petitioners had no justification for detaining her in handcuffs as long as they did. In addition, the tactical plan for this search provided for releasing non-suspect detainees from handcuffs after the securing of the premises by the SWAT team. J.A. 157.

Yet, Ms. Mena remained in the dank garage, handcuffed and in great discomfort, for between two to three hours. J.A. 72, 192 . Ms. Mena testified that her handcuffs were not taken off until she was brought into the living room. J.A. 122. There was videotaping of the living room which did not begin until after the search was completed. J.A. 69, 186-188. This post-search videotape, which has a time stamp indicating it was made two hours after the SWAT team's entry, does not show respondent in the living room at all. Instead, it shows petitioner Muehler completing paperwork in the living room while respondent remained handcuffed in a cold garage.

Petitioner Brill admitted that respondent was not released until at least ten to fifteen minutes after the search was concluded. J.A. 75. Ms. Mena testified that she was held as long as three hours. Therefore, the evidence at trial allowed the jury to find that Ms. Mena was held between 15 minutes and an hour after the conclusion of the search and that petitioners displayed a casual disregard of her rights. J.A. 69, 186-188. At trial, the officers provided no justification whatsoever for keeping Ms. Mena in restraints after the search had ended.

C. Proceedings Below

Ms. Mena filed an action pursuant to 42 U.S.C. § 1983 alleging, in relevant part, that the City of Simi Valley and eighteen of its officers, including petitioners, violated her rights under the Fourth and Fourteenth Amendments by unlawfully detaining respondent during the search of her home and by using more force than was necessary to do so. J.A. 16-31.

Before trial, all of the individual officers moved for summary judgment based on the affirmative defense of qualified immunity. The district court denied the motion as to all but one of the officers and the remaining officers filed an interlocutory appeal contending that the United States Supreme Court's decision in *Michigan v. Summers*, 452 U.S. 692, 705 (1981), gave them authority to detain residents during the lawful execution of a valid search warrant. On September 22, 2000, the Ninth Circuit held, *inter alia*, that the officers were not entitled to qualified immunity with regard to plaintiffs' claim that the circumstances of her detention violated the Fourth Amendment. *Mena v. Simi Valley*, 226 F.3d 1031, 1038-41 (9th Cir. 2000) ("*Mena I*"). The case was remanded for trial on plaintiff's remaining claims, including her unlawful detention claim.

On June 21, 2001, the jury found that petitioners violated plaintiff's Fourth Amendment rights by detaining her "with greater force than which was reasonable under the circumstances" and "for a period longer than reasonable." J.A. 255. The jury sided with petitioners on all other claims. J.A. 251-259. The jury awarded respondent $10,000 in compensatory damages and $20,000 in punitive damages against each of the petitioners. J.A. 256, 259-260.

On July 24, 2001, petitioners filed a Motion to Alter or Amend the Judgment, Or, Alternatively, for New Trial and Renewed Motion for Judgement as a Matter of Law. J.A. 261-

262. On September 6, 2001, the district court denied petitioners' motion in an extensive opinion. Pet. App. 35a-47a. The district court held that petitioners were not entitled to qualified immunity under the test established by this Court in *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, the district court held that "taken in light most favorable to the party asserting injury [Ms. Mena]", the facts alleged showed that the officer's conduct violated a constitutional right. Pet. App. 38 a. In reaching this conclusion, the district court relied on the following facts: 1) Ms. Mena was eighteen years old at the time of her detention; 2) Ms. Mena was not suspected of any crime; 3) Ms. Mena posed no threat to officers and did not resist arrest or attempt to flee; and 4) in spite of the above facts, defendants "roused her from her sleep at gun point, pushed her onto her bed and handcuffed her, refused to inform her why she was being detained, called in the INS to question her about her citizenship status, and kept her handcuffed in a garage for two or three hours, even for a time after the search was terminated." Pet. App. 39a.

Second, the district court held that reasonable officers would have known that they were violating a clearly established right. Pet. App. 39a. The court found that *Franklin v. Foxworth*, 31 F.3d 873 (9th Cir. 1994) and *Heitschmidt v. City of Houston*, 161 F.3d 834 (5th Cir. 1998) put petitioners on notice that holding a "detainee in handcuffs or failing to return her to her room after the residence has been secured and when there are sufficient officers present" would render a detention unreasonable. Pet. App. 40a. Petitioners appealed.

The court of appeals upheld the trial court's ruling in *Mena v. City of Simi Valley*, 332 F.3d 1255 (9th Cir. 2003) (*Mena II*). It found that there were ample facts demonstrating the existence of an unreasonable seizure in violation of the Fourth Amendment. Pet. App. 1a-22a. In particular, the court noted: 1) respondent was awakened abruptly by a loud noise

and opened her eyes tc find a person dressed in black pointing a gun in her face; 2) no officer during this initial encounter identified himself as an officer and respondent believed that the persons in her room had come to rob her; 3) the officers searched respondent and her room, yanked her up from her bed by her shirt, and led her out of the room in her pajamas; and 4) although it was raining and respondent was barefoot, the officers directed her outside and into a cold garage, where she was detained for two to three hours. *Id.* at 1261-1262; Pet. App. 6a-7a.

The court of appeals found that these "heightened security measures" were unjustified in light of the fact that it was clear Ms. Mena posed no threat to the safety of the officers; the search of her room and residence produced no evidence of gang membership; respondent was not a suspect in the crime; and, although the eighteen well armed officers, including members of the SWAT team, secured the house in a matter of minutes, she was handcuffed and detained for two to three hours. Based on these circumstances alone, the court concluded that her detention was objectively unreasonable and "unnecessarily degrading [and] prolonged." *Id.* at 1263; Pet. App. 8a-9a.

The court of appeals also found that the officers' questions about respondent's citizenship status and search of her purse for proof of citizenship also rendered her detention unreasonable. The court of appeals did not find this to be a separate seizure, but rather a factor which rendered her *Summers* detention unreasonable. *Id.* at 1264-1266; Pet. App. 10a-14a. However, it is clear that the court of appeals found respondent's detention to be unreasonable and in violation of the Fourth Amendment independent of its finding that the questioning of Ms. Mena was a violation of the Fourth Amendment.

SUMMARY OF ARGUMENT

The question presented by this case is whether police, when searching a house pursuant to a search warrant, have virtually unlimited authority to detain, handcuff, and interrogate an individual who happens to be present, even when there is no basis to suspect that she herself engaged in any criminal activity. Petitioners and their *amici* ask this Court to adopt a new bright line rule allowing routine handcuffing and interrogation of *Summers* detainees beyond the scope of the limited detention provided for in *Summers* and its progeny. This Court's cases are clear that law enforcement officers do not possess such unbridled authority, and that the detention, including the manner of detention, and questioning of a *Summers* detainee must be limited to that which is necessary to serve the legitimate law enforcement interests justifying this exception to the Fourth Amendment's probable cause requirement.

Under *Michigan v. Summers*, petitioners had the authority to detain Ms. Mena for a reasonable time while they diligently executed the search warrant. But, as this Court has emphasized, the reasonableness of a seizure depends "not only on *when* it is made, but also on *how* it is carried out." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

The jury and judge in this case found that petitioners' conduct violated the Fourth Amendment because of the manner in which Ms. Mena was detained during this search. *Michigan v. Summers* authorizes the detention of occupants of a home being searched for only three purposes: (1) to prevent occupants from fleeing if contraband is found during the search; (2) for officer safety; and (3) to facilitate an orderly search.

Though *Michigan v. Summers* provides for a bright line rule permitting the detention of occupants during searches pursuant to a search warrant, there is no basis in *Summers* or in

any other case of this Court, or in any other court, for a rule that allows the routine handcuffing of occupants during the course of such a search. Indeed, there is no case that adopts such a substantial intrusion into the lives of people subjected to a detention under *Summers*. Instead, under *Summers*, the police may detain occupants of a house being searched pursuant to a search warrant in order to achieve the law enforcement purposes justifying this exception. But detentions beyond that which are necessary to achieve these purposes, as occurred here, violate the Fourth Amendment.

This case involved no "split second" police decisions after the first few minutes of this operation. Petitioners had ample time to consider whether Ms. Mena should be kept in handcuffs. Nor were petitioners short-handed. At least one and often two officers guarded four harmless, innocent occupants of the property for the entire period of the search. The jury properly found that there was no justification for keeping Ms. Mena in handcuffs for such a long period of time under the circumstances.

No case authorizes the detention, much less handcuffing, of *Summers* detainees *after* the end of the search. Petitioners and the government simply ignore the uncontested fact that Ms. Mena was detained in handcuffs at least fifteen minutes, and as long as one hour, *after* the search ended. There is simply *no* justification under *Summers* or any other case for detaining or handcuffing a person after a search has been completed and the search, as here, has not developed probable cause or reasonable suspicion justifying further detention or questioning. Here, too, the jury was entitled to punish petitioners for such a blatant violation of Ms. Mena's rights, a violation that demonstrated petitioners' utter disregard for Ms. Mena's constitutional rights.

Although the abusive conduct revealed in the trial record is more than sufficient to justify the jury's verdict in this

case, the jury was also entitled to consider the other aspects of Ms. Mena's detention that render it unreasonable under the totality of the circumstances. In particular, taking Ms. Mena out of her home, without shoes, in the cold winter rain to a converted garage and waiting a half hour to give her adequate clothing was unreasonable and unjustified in the circumstances.

These officers should have known that this conduct clearly violated the Fourth Amendment. Petitioners' request that this Court transform their conduct into a bright line rule to govern police conduct across this nation is unwarranted and at odds with decades of jurisprudence requiring that detentions based on less than probable cause be no more intrusive than necessary to achieve the justifications that authorized the detention in the first place.

With respect to the questioning of Ms. Mena about her immigration status, respondent has never contended at any time that this questioning amounted to a separate, unconstitutional seizure, a fact which petitioners acknowledge in their brief. Pet. Br. 12. The court of appeals, contrary to petitioners' assertion, also never reached this conclusion. Rather, what respondent argued, which the Ninth Circuit accepted, was that the questioning of Ms. Mena was a factor that rendered her *Summers* detention unreasonable. Pet. App. 10a-14a. Therefore, whether the questioning of Ms. Mena was a separate seizure that violated the Fourth Amendment was not properly before the Ninth Circuit and is not appropriate for this Court to decide.

If this Court is inclined to rule on the separate questioning issue, the evidence at trial supports the conclusion that the questioning violated the Fourth Amendment. First, contrary to petitioners' claims, this case is not analogous to cases concerning police questioning of individuals on the street or in other public places. Here, Ms. Mena was detained in her home. This Court has held that the Fourth Amendment

provides special protection for people in their homes. *Kyllo v. United States*, 533 U.S. 27, 31, 40 (2001).

Moreover, the questioning of Ms. Mena was obviously coercive. Ms. Mena was handcuffed at gunpoint and kept in a garage under the watch of armed guards for two to three hours. The officers never told Ms. Mena why they were there. Under these conditions, it is clear that someone in Ms. Mena's position would not believe that she was free to ignore the officers' questions. There is also evidence that the questioning lengthened the time of Ms. Mena's detention. Petitioners concede, as they must, that questioning which is unduly coercive or which lengthens the time of the detention is impermissible without reasonable suspicion. Pet. Br. at 18.

Irrespective of whether the questioning was coercive or extended the duration of the detention, the questions were unrelated to any of the justifications for the *Summers* exception to probable cause, and thus were impermissible for this reason alone. The jury was entitled to find that the officers' claim that they needed to know about the immigration status of the detainees because some members of the West Side Locos gang were illegal immigrants was pretextual. Indeed, the officers' actions indicate that they had no interest in knowing whether any of the detainees were gang members. None of them were questioned about this issue at all. Petitioners simply brought an immigration officer to enforce the immigration laws in a manner wholly unrelated to the purposes of the search warrant.

Petitioners also lacked reasonable suspicion that Ms. Mena was an undocumented alien. Petitioners contention is based solely on Ms. Mena's national origin and her possible association with undocumented immigrants. This Court has held that neither of these factors constitute reasonable suspicion. *United States v. Brignoni-Ponce,* 422 U.S. 873, 885 (1975). In a state which has millions of people of Hispanic

national origin, any other rule would authorize widespread intrusions based on racial profiling.

Petitioners are not entitled to qualified immunity because the law was clear that questioning which is unduly coercive and lengthens the time of detention is impermissible without reasonable suspicion. Likewise, the law was clear that questions posed to a detainee seized on less than probable cause must be related to the reasons for her detention.

ARGUMENT

I. *MICHIGAN V. SUMMERS* AND ITS PROGENY DO NOT AUTHORIZE THE MANNER IN WHICH PETITIONERS DETAINED MS. MENA.

A. The Jury's Verdict is Entitled to Deference.

Petitioners pay lip service to their concession that, "[t]o be sure, the facts must be found in the light most favorable to respondent because of the jury verdict..." Pet. Br. 29. Yet, petitioners' brief presents a view of the "facts" entirely from petitioners' perspective, as though there were no jury verdict or contrary evidence.

Even if this Court applies the *de novo* standard applied in *Ornelas v. United States*, 517 U.S. 690 (1996), the starting point must be the evidence at trial viewed in the light most favorable to the verdict, as well as all reasonable inferences from these facts. The jury's determination in this case of the background facts on which they based their verdict "provide a context for the historical facts and when seen together yield inferences that deserve deference." *Id.* at 699. As this Court emphasized in *Ornelas*, "we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to

inferences drawn from these facts by resident judges and local law enforcement officers." 517 U.S. at 699. This is especially important here where the credibility of petitioners' justifications was tested before the jury and trial judge.

Thus, the evidence in this trial record is that there was no factual justification for maintaining Ms. Mena in handcuffs for the entire duration of this search and that Ms. Mena was detained in handcuffs for fifteen minutes to an hour after the search ended without any justification.

Under petitioners' version of *de novo* review, this Court is being asked to accept justifications for petitioners' actions which were before the jury and trial judge and which were rejected by both under the appropriate legal standard. Only if no reasonable jury could find petitioners liable, viewing the facts in the light most favorable to Ms. Mena, may the jury's judgment be reversed. *See, e.g., Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151-153 (2000). Any other methodology would violate Ms. Mena's Seventh Amendment rights.

B. *Michigan v. Summers* and Its Progeny Did Not Authorize the Manner in Which Ms. Mena Was Detained in this Case.

1. *Michigan V. Summers* Authorizes a Limited Detention During the Search of a House for Specific Purposes.

Michigan v. Summers, 452 U.S. 692 (1981), does not authorize the "routine" handcuffing or any other heightened security measures by officers to detain residents at the scene of a search authorized by a valid search warrant. *Summers* allows for the limited detention of those present at a search location without a warrant but any additional intrusions on the rights of

such detainees must be justified by the specific law enforcement needs identified in *Summers* or must have some independent, additional justification. Detentions which are the functional equivalent of arrests, as here, can never be considered "routine" or "ordinary".

In *Summers*, the issue before this Court was whether law enforcement officers possessed the authority to detain an occupant without probable cause during the search of his residence pursuant to a valid search warrant. *Id.* at 694-695. Recognizing the general rule that seizures must be supported by probable cause, the *Summers* Court noted that some seizures "covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained" that they could be made on less than probable cause, provided there was a articulable basis for suspecting criminal activity. *Id.* at 699-700.

In order to determine whether the seizure of the defendant pursuant to a search warrant was valid, the *Summers* Court examined the "character of the official intrusion and its justification." *Id.* at 700-701. With respect to the "character of the official intrusion", the *Summers* Court emphasized that the seizure of the defendant was "substantially less intrusive" than an arrest. *Id.* at 701-702. This observation was certainly true of the detention in *Summers* itself. The defendant in *Summers* was not handcuffed, moved to another location, or restrained in any manner other than not being allowed to leave his residence during the search and was treated with respect. *Id.* at 693-694. This Court did not address the issue of handcuffs in *Summers*. The use of handcuffs has always been considered to elevate the intrusiveness of a search or seizure.[7]

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[7] *Dunaway v. New York*, 442 U.S. 200, 215 & n.17 (1979); *United States v. Glenna*, 878 F.2d 967, 972 (7th Cir. 1989) (use of handcuffs substantially aggravates intrusiveness of detention).

This Court contrasted the circumstances of Mr. Summers detention with the circumstances of the detention in *Dunaway v. New York*, 442 U.S. 200 (1979), where the defendant was taken into custody and interrogated on less than probable cause in violation of the Fourth Amendment. This contrast clearly indicated that detentions permissible under *Summers*, without additional justification, must be in "sharp contrast to...[a] custodial interrogation." *Id.* at 702.

The *Summers* Court found justification for such limited detention without probable cause during the execution of a search warrant justified by certain, specific law enforcement interests arising in this context. These justifications were: preventing flight in case incriminating evidence was found during the course of the search; minimizing the risk of harm to officers; and the facilitation of the orderly completion of the search. *Id.* at 702-703. Any intrusion based on less than probable cause must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *Illinois v. McArthur*, 531 U.S. 326, 331 (2001).

These considerations, in conjunction with this Court's determination that there was an objective justification for the detention based on the magistrate's assessment that criminal activity was likely occurring on the premises, led this Court to conclude that "a warrant to search for contraband founded on probable cause implicitly carries with it the *limited authority* to detain the occupants of the premises while a proper search is conducted." *Summers,* 452 U.S. at 705 (emphasis added).

The *Summers* decision was predicated on the fact that such detentions would "add only minimally" to the intrusion already authorized by a search warrant. *Id.* 702. However, the *Summers* decision made clear that "special circumstances" or "a prolonged detention" and other detentions which are not "routine" were beyond the exception this Court was permitting.

Id. at 705 n. 21. Thus, *Summers* holds that officers may detain an occupant during a search as long as the detention is minimally intrusive and necessary to achieve the law enforcement interests of protecting officer safety, preventing flight, and facilitating an orderly search of the premises.

Contrary to what petitioners assert, this Court in *Summers* did not hold or even suggest that officers could routinely handcuff detainees for hours on end or subject them to questioning unrelated to the object of the search, or to otherwise cause them unnecessary pain or discomfort. This Court has never authorized detentions for even fifteen minutes beyond the completion of a search without any justification. Petitioners' concept of what ought to be considered a "routine" detention in the course of a search is not found in this Court's *Summers* decision.

Indeed, *Summers* cannot be read, as petitioners urge, as a per se authorization of the use of handcuffs during a *Summers* detention. *Summers* clearly indicates that detentions which resemble formal arrests, like the detention in *Dunaway,* are beyond the scope of the exception it created. Indeed, petitioners' interpretation of *Summers* ignores the *Summers* Court's statements that only "limited intrusions" on an individual's liberty may be made on less than probable cause. *Summers,* 452 U.S. at 699.

The detention in this case was anything but a "limited intrusion". Ms. Mena was awakened by men dressed in all black who pointed guns in her face. Ms. Mena was handcuffed, marched outside in the rain to the garage, and kept in handcuffs for as long as three hours. Ms. Mena was interrogated about her immigration status and had her purse searched without consent. Ms. Mena was also kept in restraints after the search was completed.

These circumstances establish that Ms. Mena's detention was the functional equivalent of an arrest and not the kind of limited intrusion authorized by *Summers*.[8] This Court has never permitted arrests on anything less than probable cause. *Dunaway*, 442 U.S. at 211-217.

Indeed, Ms. Mena's detention more closely resembles the detention in *Dunaway* than the one in *Summers*. Moreover, because Ms. Mena was questioned about her immigration status, her detention, like the one in *Dunaway*, possessed "coercive aspects likely to induce self-incrimination." *Summers*, 452 U.S. at n.15. In *Summers*, this Court justified the detention that took place in part because it did not have the coercive aspects that would likely lead to self-incrimination. *Id.* *See infra § II(B).*

Petitioners' interpretation of the scope of the *Summers* exception is also at odds with how this Court has treated other seizures made on less than probable cause. Petitioners and their *amici* essentially urge this Court to adopt a bright line rule allowing officers during a search pursuant to a warrant to routinely utilize intrusive restraints and methods of control regardless of the particular circumstances confronting the officers. However, in other similar contexts, this Court has refused to adopt such a bright line rule.

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[8]*See, e.g., Brown v. Illinois*, 422 U.S. 590 (1990) (likening seizure to an arrest where officers drew their guns, informed individual he was under arrest, and handcuffed him); *Kaup v. Texas*, 538 U.S. 626 (2003) (arrest had taken place where 17 year old boy was awakened in his bedroom at three in the morning by police, was handcuffed and taken out by police without shoes and dressed only in his underwear, was placed in a patrol car, and interrogated at sheriff's office); *Florida v. Royer*, 460 U.S. 491, 502 (1983) (Court considers an "arrest" to have taken place where defendant was taken to a room 45 feet from where he was initially stopped by police officers, was interrogated, and had his luggage searched); *Dunaway*, 442 U.S. at 215 & n.17 (listing handcuffs as a "trapping [] of a technical formal arrest).

In *Summers* this Court relied on *Terry v. Ohio* in holding that the defendant could be detained on less than probable cause. *Summers*, 452 U.S. at 698-701. As in the case of a detention during an authorized search, *Terry* permits officers to detain suspects briefly, in the absence of probable cause, for a particular purpose – i.e. that there is reasonable suspicion that the person has committed or is about to commit a crime. However, as the *Summers* Court recognized, in the absence of specific, articulable facts which demonstrate that the suspect may be armed and dangerous, a forcible detention will not be justified pursuant to *Terry*. *Summers*, 452 U.S. at n.9.[9]

The determination of whether a particular *Terry* stop is reasonable pursuant to *Terry* does not end merely because it was justified at its inception. *Terry* also made clear that the scope of the frisk had to be strictly limited to that "which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*, 392 U.S. at 26. If the search went beyond what was necessary to determine if the suspect was armed, it was no longer valid under *Terry*.[10] Thus, rather than developing a bright line rule, the *Terry* line of cases look to determine whether the scope of the search is justified by the circumstances which rendered the stop permissible. *Terry*, 392 U.S. at 19.

This Court's cases after *Terry* have insisted that the scope of a *Terry* stop be justified specifically by the law enforcement needs underlying this exception to the probable cause requirement. In *United States v. Sharpe*, 470 U.S. 675,

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[9]*See Ybarrā v. Illinois*, 444 U.S. 85, 88 (1979) (police executing a search warrant at a tavern could not invoke *Terry* unless the officers had individualized suspicion that the patron may be armed and dangerous).

[10]*See Sibron v. New York*, 392 U.S. 40, 65-66 (1968); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

685 (1985), this Court declined to adopt a bright line rule on the length of *Terry* stops. Instead, this Court stated that "common sense and ordinary human experience" should govern over rigid criteria. *Id.*

In *Florida v. Royer*, 460 U.S. at 500, this Court recognized that the scope of a detention made on less than probable cause must be carefully tailored to its underlying justification, and whether or not a particular detention is reasonable will vary "with the particular facts and circumstances with each case." *Id.*

Similarly, in *United States v. Brignoni-Ponce*, this Court held that when an officer's observations lead him to suspect that a particular vehicle may contain illegal aliens, he may stop the vehicle and investigate the circumstances that invoked suspicion. *Brignoni-Ponce*, 422 U.S at 881. However, the detention "must be 'reasonably related in scope to the justification for [its] initiation.'" *Id.* at 881; *accord United States v. Cortez*, 449 U.S. 411, 421 (1981). The *Brignoni-Ponce* Court therefore held that while an officer may question the driver and passengers about their citizenship and immigration status, as well as ask them about suspicious circumstances, any further detention or search had to be based on consent or probable cause. *Brignoni-Ponce*, 422 U.S. at 881-882.

A similar approach is warranted here rather than the bright line rule proposed by petitioners and their *amici*. That is, whether or not particular conduct during a detention is reasonable should depend on whether the conduct is reasonably necessary in light of the historical facts found by the jury to achieve the law enforcement interests identified by the *Summers* Court (officer safety, preventing flight in the case incriminating evidence is found, facilitating an orderly search). Detentions conducted in a manner that cannot be justified by these law enforcement interests violate the Fourth Amendment.

There is no compelling reason for adopting a bright line rule authorizing the police conduct at issue in this case as being "routine" during detentions authorized by *Summers*. There is no empirical basis for believing that detentions during the course of searches pursuant to a warrant inherently require the routine use of handcuffs for the entire period of the search. Many *Terry* stops occur in dangerous contexts, yet this Court has never established a per se rule authorizing "routine" handcuffing or other detention measures for people who are subjected to *Terry* stops.[11]

There is good reason for this in a free society. The consequences of accepting petitioners' limitless reading of *Summers* would be enormous for this argument has no logical stopping point. If this Court accepts petitioners' interpretation of *Summers*, it would mean that *Summers* authorizes the handcuffing as a matter of routine, even for hours, of children and the elderly or sick, regardless of whether there is any information that they pose a threat to officer safety and are likely to flee or destroy evidence. Under petitioners' reading of *Summers*, a search warrant for a restaurant or a bar would authorize the handcuffing of everyone present in the bar at the time of the search, including patrons, until the search was completed, perhaps for hours.

Similarly, a search warrant for an apartment building would authorize the routine handcuffing of every resident of the

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[11]The lower courts have also declined to adopt a per se rule authorizing the use of handcuffs in connection with *Terry* stops. To the contrary, lower courts have allowed the use of handcuffs in the context of a *Terry* stop only when justified by the enforcement needs which led to the creation of the *Terry* exception in the first place. *See United States v. Smith*, 3 F.3d 1088, 1094-1095 (7th Cir. 1993); *United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993); *United States v. Saffeels*, 982 F.2d 1199, 1205-1206 (8th Cir. 1992).

apartment building. This, in essence, is what happened in this case. None of the detainees lived with Raymond Romero or had anything to do with him. They had the misfortune of living in a place where Mr. Romero had a small apartment. The only difference between this and a more traditional apartment building is that Ms. Mena's parents are poor immigrants who rented some rooms to other poor immigrants.

There is nothing in *Summers* or any other case decided by this Court which suggests that these absurd results were intended. On the contrary, in *Ybarra v. Illinois*, 444 U.S. at 86, this Court held that a warrant to search a tavern and one particular bartender for heroin and other contraband did not authorize the police "to invade the constitutional protections possessed by the tavern's customers."

2. The Manner in Which Lower Courts Have Applied *Michigan v. Summers* is Inconsistent With Petitioners' Reinterpretation of *Summers*.

Lower federal courts have insisted that the manner in which *Summers* detentions are conducted must be justified by the three law enforcement justifications for this exception to the probable cause requirement. Petitioners mischaracterize the manner in which lower courts have applied *Summers*. Indeed, the cases cited by petitioners (*Pet Br.* at 34) actually reject, rather than support, petitioners' interpretation of *Summers* and petitioners' so-called "unusual case" exception.

Both *Williams v. Kaufman County*, 352 F.3d 994, 1008-1009 (5th Cir. 2003) and *Heitschmidt v. City of Houston*, 161 F.3d 834, 838 (5th Cir. 1998), held that detentions pursuant to a search warrant would only be lawful if the justifications for the detention (officer safety, preventing flight) outweighed the intrusiveness of the detention. In *Franklin v. Foxworth*, 31 F.3d

873, 976-878 (9th Cir. 1994), the court relied on the "totality of the circumstances test" in *Graham v. Connor*, 490 U.S. 386 (1989), to determine the lawfulness of the detention in that case. However, its analysis is entirely consistent with the uniform approach in the lower courts of requiring officers to justify the manner in which people are detained under *Summers* in the particular circumstances faced by the officers and in light of the rationale for this exception.

The lower courts have refused to employ a categorical approach to the manner in which *Summers* detentions are conducted and instead evaluate the intrusiveness of the detention balanced against the law enforcement interests presented by the actual circumstances facing the officers.[12]

Petitioners cite three cases in support of their theory that the circumstances of a *Summers* detention will only be found unreasonable in the context of exceptionally egregious police conduct. Pet. Br. 37-38; *United States v. Fountain*, 2 F.3d 656 (6th Cir. 1993), *United States v. Thompson*, 91 F.3d 145 (6th Cir. 1996) *available at* 1996 WL 428418, and *Crosby v. Hare*, 932 F. Supp. 490 (W.D.N.Y. 1996).

These cases do not support petitioners' reinterpretation of *Summers*. In each of these cases there was a particularized finding that the officers' conduct was reasonable in light of the circumstances they faced.

For example, in *United States v. Fountain*, 2 F.3d 656 (6th Cir. 1993), handcuffing the occupants and forcing them to lay face down during the search was justified by several

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[12] *See, e.g. Stuart v. Jackson*, 24 Fed. Appx. 943 (10th Cir. 2001) *available at* 2001 WL 1600722, 2-5; *Ingram v. City of Columbus*, 185 F.3d 579, 592 (6th Cir. 1999); *Baker v. Monroe Township*, 50 F.3d 1186 (3rd Cir. 1995); *Renalde v. City and County of Denver*, 807 F.Supp. 668, 671-672 (D. Colo. 1992); *Torres v. United States*, 200 F.3d 179, 184-186 (3rd Cir. 1999); *United States v. Rodriguez*, 68 F.Supp.2d 194, 109-110 (D. Puerto Rico 1999).

circumstances not present in this case. First, during a prior search of Fountain's home, Fountain was observed destroying contraband. Automatic handguns were also seized from his home. *Id.* at 659. Moreover, during the search, narcotics were found in Fountain's pocket and three firearms were found in the hall closet. *Id.* at 660. The *Fountain* court ruled that in light of these circumstances, the actions of the law enforcement officials were reasonable and proportional to their interests in preventing flight and minimizing the risk of harm to the officers. *Id.* at 663. In this case, Ms. Mena made no attempt to destroy evidence and was not suspected of engaging in any criminal activity. There was also no contraband of any sort found on her or in her room. The target of the search was not home. Thus, *Fountain* is readily distinguishable.

Petitioners' reliance on *United States v. Thompson*, 91 F.3d 145 (6th Cir. 1996) is also misplaced. There is no indication in *Thompson* of how long the defendant was restrained in handcuffs, or if the officer's promptly released him after the search was completed, or if he suffered discomfort during the time he was handcuffed, all of which could differentiate this case. Morever, the defendant in *Thompson* was a person suspected of selling drugs.[13] In this case, officers knew that Ms. Mena was not suspected of any criminal activity. *Id.* at 1.

Similarly, in *Crosby v. Hare*, 932 F. Supp.490 (W.D.N.Y. 1996), law enforcement officers possessed a warrant to search for contraband, in particular, illegal drugs at the plaintiff's home. *Id.* at 491-492. The plaintiff was suspected of selling drugs. *Id.* She was handcuffed for only approximately

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[13]Contrary to what petitioners assert, whether the person being detained is a suspect as opposed to an innocent bystander is an important distinction. *Ingram*, 185 F.3d at 592; *Baker*, 50 F.3d at 1193.

90 minutes, during which time she remained in the living room, and was released from her handcuffs as soon as the search was completed. *Id.*[14] Contrast that with this case where Ms. Mena, who was only 18, was held in handcuffs in a cold and damp garage for two to three hours, and kept in restraints after completion of the search even though she was not suspected of criminal activity.

Thus, what accounts for the different conclusions reached by the courts in *Fountain*, *Thompson*, and *Crosby* were facts unique to those cases which are not present here. None of these cases endorse the routine handcuffing of detainees pursuant to *Summers*. To the contrary, there are numerous lower court decisions from around the country which hold that handcuffing a person during a *Summers* detention is unconstitutional if not warranted by the particular circumstances facing the law enforcement officers.[15]

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[14]Although the plaintiff was initially naked when the officers entered her home, she was watched by a female officer during this period (who was the only person in the room with her) and was provided with clothes within 15 to 20 minutes from when officers first entered the home. *Id.* at 492.

[15]*Stuart*, 24 Fed. Appx. 943 *available at* 2001 WL 1600722 at 2-5 (jury entitled to find that handcuffing of occupants of residence during search and placing them in van, when occupants cooperated with search and made no threats, was objectively unreasonable); *Ingram*, 185 F.3d at 592 (6th Cir. 1999)(court rejects argument that *Summers* authorized police to handcuff occupants where occupants posed no threat); *Baker*, 50 F.3d at 1193 (pointing guns and handcuffing visitors to residence during a drug raid was not reasonable); *Renalde*, 807 F.Supp. At 672 (detention unreasonable where occupants were handcuffed for prolonged period of time and where there was no justification for handcuffing after initial sweep); *Rodriguez*, 68 F.Supp.2d at 110 (three hour detention in handcuffs after agents had secured premises and ascertained that defendant was not armed was unreasonable). The *Renalde* court also stated, "[w]ith 12 officers on the

The United States claims that the lower courts have routinely upheld the use of handcuffs in a *Summers* detention. U.S. Br. at 17, fn. 5. However, none of the cases cited by the government establish that handcuffing is "routine" and therefore per se reasonable during a *Summers* detention. Quite the opposite, these cases hold that the scope of *Summers* detentions must be related to the justifications which authorized the detention in the first place.[16] Many of the government's cases involve facts and circumstances which differ materially from this case.[17]

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scene the police could have easily satisfied their legitimate interests, for example, by allowing plaintiffs [4] to sit on couch in living room with an armed guard." *Renalde*, 807 F.Supp. at 672. A similar conclusion is mandated here given the presence of 18 officers.

[16]*See, e.g., Torres v. United States of America*, 200 F.3d 179, 184-187 (3rd Cir. 1999); *United States v. Guadarama*, 128 F.Supp.2d 1202, 1218 (E.D. Wis. 2001); *United States v. Fountain*, 2 F.3d at 664; *State v. Schultz*, 23 Ohio App.3d 130, 133 (Ohio Ct. App. 1985); *People v. Ornelas*, 937 P.2d 876 (Colo. Ct. App. 1996).

[17]*See United States v. Fulwood*, 86 F.3d 27, 29-30 (7th Cir. 1996) (handcuffs removed once premises were secured by officers); *State v. Apalakis*, 797 A.2d 440, 446 (R.I. 2002) (detention and questioning lasted five minutes); *Turner v. Sheriff of Marion County*, 94 F.Supp.2d 966, 979 (S.D. Ind. 2000) (detained in handcuffs for fifteen minutes); *Guadarama*, 128 F.Supp.2d at 1218 (fifteen minute detention in handcuffs); *United States v. Zuccarini*, 172 Mich.App. 11, 14 (M.I. Ct. App. 1988) (handcuffing and detention only occurred during time police were attempting to secure the premises). *Wilson v. State*, 547 So.2d 215, 216-217 (Fla. Dist. Ct. App. 1989) (No indication in opinion as to how long the suspect was detained). Had Ms. Mena been handcuffed only for the few minutes it took the SWAT team to secure the premises this would be a very different case.

In short, the government's cases do not establish any bright-line rule which automatically entitles officers to handcuff occupants during a *Summers* detention. In fact, the cases cited by the government apply particularized inquiries into justification for each such intrusion, as this Court's cases require and as the jury and trial judge here followed.

Petitioners also cite to a number of cases where the courts upheld detentions lasting two to three hours. Pet. Br. at 38. None of these cases, however, involve handcuffing, or the other conduct which this jury relied on to find this detention to be unreasonable. Rather, they are cases, like *Summers* itself, where the occupants were merely prevented from leaving while the search was being conducted. If Ms. Mena was allowed to sit in her living room without handcuffs only as long as the search itself lasted and was treated with a modicum of respect, the jury would not have found petitioners liable or imposed punitive damages against them.

Petitioners also rely on a number of cases where lower courts upheld the use of handcuffs during an investigatory stop. Pet. Br. at. 37, fn. 10. However, none of these cases create a bright line rule that allows for the routine use of handcuffs during a *Terry* stop. On the contrary, the cases acknowledge that there is no bright line rule for determining when police conduct exceeds the bounds of an investigative stop.[18] Indeed, in *United States v. Smith*, the court observed that the use of handcuffs would only be justified in the "rare" instance where it is demonstrated that the investigative stop could only be effectuated safely by the use of handcuffs. 3 F.3d at 1094. Thus, petitioners' cases support the conclusion that the use of handcuffs will render a detention unreasonable where it is not justified by the particular law enforcement interests that led to the creation of the exception to the probable cause requirement in the first place. No such justification was present here.

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[18]*See, e.g., United States v. Saffeels*, 982 F.2d 1199, 1205-1206 (8th Cir. 1992); *Merkley*, 988 F.2d at 1064.

3. The Manner In Which Ms. Mena Was Detained Was Unreasonably Intrusive.

When the evidence at trial is viewed in the light most favorable to Ms. Mena, it is clear that the way in which she was detained cannot be justified by officer safety, the prevention of flight, or the facilitation of an orderly search.

Indeed, the evidence at trial demonstrated that the officers did not believe that Ms. Mena was involved in any criminal activity prior to executing the search warrant. There was also no evidence that Ms. Mena was affiliated with any gang. After the search began, Ms. Mena complied with the officers' commands at all times and the officers conceded at trial that they did not believe she posed a threat. Further, there were 18 officers involved in the search and the premises were secured in a matter of minutes. There were more than enough officers to detain Ms. Mena without any additional restraints. This was not a case in which officers had to choose between officer safety and conducting the search.

There was simply no justification for the harsh manner in which Ms. Mena was treated. There was no justification for keeping her in handcuffs for so long. Ms. Mena experienced extreme discomfort from the handcuffs but the officers refused

to remove them.[19] She was detained and kept in handcuffs for as long as three hours in the damp garage.

Significantly, Ms. Mena remained in handcuffs for at least fifteen minutes to an hour *after* the search had been completed. No justification was offered or could be offered for this continued detention after the search was completed. Even a fifteen minute detention without justification was more than sufficient to justify the jury's verdict.

Indeed, in *United States v. Sharpe*, this Court carefully evaluated whether a *Terry* stop approximately twenty minutes in duration was too long. *Sharpe*, 470 U.S. at 687. In this case, petitioners detained Ms. Mena in handcuffs for almost that long after their search was over when there was *no* justification for Ms. Mena's continued detention, much less detention in restraints. Indeed, petitioners' callous treatment of this vulnerable eighteen year old woman is a cautionary tale of what might happen if this Court adopts the bright line rule sought by petitioners and their *amici*.

The coercive interrogation of Ms. Mena about her immigration status was an additional example of how

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[19]Petitioners assert that Ms. Mena does not have a claim of being placed in overly tight handcuffs because she never indicated to the officers that they were painful. Pet. Br. at 6. However, Ms. Mena's request to have the handcuffs removed was refused by an officer. Thus, she had no reason to believe that telling the officers the handcuffs were too tight would have resulted in relief. Moreover, the main point here is that a person in Ms. Mena's position should not have been forced to assert her right to be free from uncomfortable restraints when there was no justification for restraining her after the first few minutes of this operation.

petitioners exceeded the scope of the detention authorized in *Summers*.[20] *See* § II(B), *infra*.

The overall abusive and demeaning treatment of Ms. Mena was also something the jury was entitled to consider in evaluating the reasonableness of the manner in which this *Summers* detention was accomplished. This Court did not endorse such demeaning treatment in *Summers* and the jury was surely entitled to consider such facts as waiting thirty minutes to provide a coat and shoes for a handcuffed teenager taken by officers through the pouring rain from her bedroom to a cold converted garage.

The evidence at trial clearly established that petitioners far exceeded the limited authority *Summers* granted them to detain Ms. Mena. Nonetheless, petitioners argue in their brief that the scope of the detention of Ms. Mena was justified. However, the facts petitioners rely upon to support this conclusion were disputed in the record and therefore must be rejected by the Court as not being in the light most favorable to the verdict.

For instance, petitioners claim that they were executing a search warrant at a house that they reasonably suspected to be a "gang safe house." Pet. Br. at 31. This is contradicted by the fact that the warrant and affidavit for the Mena residence never referred to the residence as a "gang safe house" but rather a "poorhouse" comprised of multiple families living in a residence designed for one family. J.A. 219. Moreover, petitioners had been to the Mena residence before but no one they encountered fit the description of a gang member. J.A. 56, 179.

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[20]These issues are discussed in more detail in the *amicus curiae* brief filed by the National Association of Criminal Defense Lawyers.

As for petitioners' claim that the occupants of the Mena residence could have been members of the West Side Locos (Pet. Br. at 31-32), this is belied by the fact that Petitioner Brill testified that he had no information that any of the Menas were involved in any gang. J.A. 65-66. Moreover, the search warrant and affidavit fail to identify any other gang member besides Mr. Romero who may have been residing at the residence at the time of the search. J.A. 219-221.[21]

Petitioners claim that the handcuffing and the other conduct perpetrated against Ms. Mena were justified are also contradicted by the tactical plan developed by the officers prior to executing the search warrant. The tactical plan only called for a temporary detention in handcuffs of the occupants until the location was secured, the occupants were patted down and had provided their names and other information so the officers could complete Field Identification Cards. J.A. 157. As stated above, the evidence demonstrated that within minutes of storming the residence, the officers had safely secured the home. J.A. 147-148. There was also no testimony from any officer in this case that any of the occupants of the residence were anything but compliant with officer commands. Despite these facts, Petitioner Brill decided to keep each of the occupants, including Ms. Mena, detained in handcuffs during the entire search, essentially abandoning the tactical plan.[22] If anything, the circumstances before the officers after they secured the Mena home should have led them to release Ms. Mena and the other occupants from handcuffs and not the opposite. In fact, the target of the search, Mr. Romero, was not

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[21]Petitioners had information that the only other person suspected of being a gang member who may have lived at the Mena residence had already moved out. J.A. 219-220.

[22]Indeed, the officers failed to prepare the Field Identification Cards. J.A. 74-75.

treated in such a harsh fashion as Ms. Mena during a simultaneous search conducted at another residence. J.A. 154.

Overall, there was ample evidence before the jury to conclude that the manner in which Ms. Mena was detained was unreasonable in violation of the Fourth Amendment. The jury was entitled to reject petitioners' version of events given the substantial evidence which contradicted petitioners' claims.

C. The Officers Were Not Entitled to Qualified Immunity.

The district court in considering petitioners' post-trial motions analyzed the evidence in this case under the principles set forth by this Court in *Saucier v. Katz*, 533 U.S. 194, 201 (2001)[23] and properly rejected petitioners' claims after viewing the evidence before the jury in the light most favorable to the verdict.

In *Saucier,* this Court articulated the two-step qualified immunity analysis. First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Id. Second, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted". *Id.* at 202.

Section I(B) above establishes that the manner in which Ms. Mena's detention was accomplished in this case was unreasonable in violation of the Fourth Amendment. As such, whether petitioners are entitled to qualified immunity depended on whether their conduct violated "clearly established statutory

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[23]The questions presented in the petition do not include the issue of qualified immunity, thus, the issue is not properly before the Court. *See* U.S. Br. 22, fn. 7. SUP. CT. R. 14.1(a) ("[on]ly the questions set out in the petition, or fairly included therein, will be considered by the Court.").

or constitutional rights of which a reasonable person would have known." *Hope v. Pelzner*, 536 U.S. 730, 739 (2002); *accord Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284,1293 (2004). In *Hope*, this Court clarified that the factual situation from which the preexisting constitutional right was derived does not have to be "fundamentally similar" to the one before it when addressing qualified immunity. *Id.* at 740. Rather, qualified immunity can be overcome as long as prior decisions gave "reasonable warning" that the conduct in question violated the law. This means that officials can still be on notice that their conduct violates "established law" even in "novel factual circumstances." *Id.* at 718.

Petitioners are not entitled to qualified immunity. *Summers* and its lower court progeny provided petitioners with "reasonable warning" that detentions which are more intrusive than necessary to protect officer safety, prevent flight and facilitate the orderly search of the premises would be unlawful. *Summers*, 452 U.S. at 702-703. Indeed, *Summers* clearly states that the "character of an official intrusion" must be judged with respect to "its justification", and that prolonged and non-routine detentions could violate the constitution. *Id.* at 701, n. 21. In the face of this language, it is simply unreasonable to conclude, as petitioners do, that handcuffing a compliant and non-threatening occupant such as respondent for 2 to 3 hours, including keeping her handcuffed after the search was completed, was permitted by *Summers*. Nor is there any support in the post-*Summers* case law which offers any support for petitioners' conduct or their claim that *Summers* detainees may be routinely handcuffed.

Franklin v. Foxworth also provided petitioners with ample notice that their conduct during the search would be unlawful. *Franklin* put petitioners on clear notice that an otherwise lawful detention could become unlawful by virtue of the manner in which it is carried out. *Franklin*, 31 F.3d at 876.

Franklin held that "unnecessarily painful, degrading, or prolonged" detentions, as well as detentions that involve an "undue invasion of property", would be unreasonable. *Id.* at 876. *Franklin* also made clear that where officers had no reason to believe that the occupant committed any crime, was armed, or otherwise dangerous, heightened security measures such as handcuffing would be inappropriate. *Id.* at 876-877.

Petitioners argue that *Franklin* did not give "reasonable warning" that their conduct would be unlawful because the conduct in that case was more egregious than here. Pet. Br. at 39. First, petitioners' conclusion is debatable, as there is conduct in this case not present in *Franklin* that arguably makes this case just as egregious if not more so. In particular, the plaintiff in *Franklin* was never (1) kept in handcuffs **after** the search was completed, (2) kept in a cold and damp garage for two to three hours, or (3) interrogated about his immigration status and had his purse searched for proof of citizenship.

Second, petitioners ignore this Court's comments in *Hope* that conduct can be "clearly established" as being unlawful even if the factual situation from which the unlawfulness of the conduct was established is materially different. Petitioners essentially urge this Court to adopt the overly restrictive view of qualified immunity that was rejected in *Hope*. However, the fact that this case is not "factually identical" to *Franklin* does not preclude a finding that petitioners had reasonable notice that their conduct towards Ms. Mena was unlawful. The reasoning of a case can put petitioners on notice of unlawful conduct, which *Franklin* clearly does. *Hope, supra*, 536 U.S. at 741.[24] Indeed, the entire body of post-

[24]In trying to distinguish *Franklin*, petitioners emphasize the fact that the *Franklin* court failed to discuss the reasonableness of handcuffing two other individuals besides the plaintiff. Pet. Br. at 40. However, considering the other individuals did not have claims before the *Franklin* court, there would be no reason for the court to decide the reasonableness of their detention, and therefore nothing can be derived from the court's failure to address this situation.

Summers jurisprudence undermines petitioners' qualified immunity claim. There is *no* case which allows *Summers* detainees to be treated the way Ms. Mena was treated without substantial and specific justification for each intrusion beyond the detention itself authorized by *Summers*. *See* § I(B).

Indeed, in a case cited by petitioners, *United States v. Taylor*, 716 F.2d 701, 707 (9th Cir. 1982), the Ninth Circuit, as far back as 1982, ruled that a detention was not justified where it did not advance the governmental interests of officer safety and preventing flight.[25] Accordingly, for the reasons stated above, petitioners had "reasonable warning" that their conduct violated the law. The district judge properly denied petitioners' qualified immunity defense.

[25]As for *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003), petitioners ignore that the court determined that Meredith's detention in handcuffs was not justified under the totality of the circumstances. *Id.* at 1062-1063. Nonetheless, the *Meredith* court found that the officers were entitled to qualified immunity on this claim because it had not been clearly established in any circuit that handcuffing a person and detaining her in handcuffs under the circumstances the officers faced in *Meredith, standing alone,* would violate the Fourth Amendment. *Id.* at 1063-1064. However, the case the *Meredith* court cites for this proposition, *Heitschmidt v. City of Houston*, 161 F.3d 834, 838-839 (5th Cir. 1998), held that there was no qualified immunity for a detention involving handcuffing that occurred in *1994*. Thus, *Meredith* is internally inconsistent in this regard.

II. THE QUESTIONING OF MS. MENA ABOUT HER IMMIGRATION STATUS IS NOT AN ISSUE PROPERLY BEFORE THIS COURT, BUT IF IT IS REACHED, THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE QUESTIONING VIOLATED THE FOURTH AMENDMENT.

A. The Questioning of Ms. Mena About Her Immigration Status Is Not An Issue Properly Before This Court.

The jury's verdict in favor of Iris Mena was based entirely on her being illegally detained in violation of the Fourth Amendment. There was no mention in Mena's complaint or at the trial of a Fourth Amendment claim based solely on Ms. Mena being questioned about her immigration status. Petitioners rightly make exactly this point in their brief: "Mena had never claimed at trial or on appeal that the officers' questioning alone was a seizure. . . ." Pet. Br. at 12. "This theory of liability was never presented at trial, and therefore the jury never made any findings on it. Respondent did not argue at trial or on appeal that the questioning alone violated the Fourth Amendment. Indeed, the questioning was not even mentioned in her closing argument or in the jury instructions." *Id.* at 16.

Therefore, the issue of whether the Fourth Amendment was violated by Ms. Mena's questioning was not properly before the Ninth Circuit and is not appropriate for this Court to decide. As Justice Scalia expressed, "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties

before them." *Carducci v. Reagan*, 714 F.2d 171, 177 (D.C. Cir. 1983). This Court likewise has explained: "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural system contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal alone is competent to decide." *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941).

Nor did the Ninth Circuit hold that the questioning of Ms. Mena about her immigration status was by itself a seizure in violation of the Fourth Amendment. At no point in the opinion does the Ninth Circuit state that the questioning amounted to a separate, unconstitutional seizure. The Ninth Circuit's analysis focused on whether there were sufficient facts to support the jury's verdict that Ms. Mena's detention was unreasonable. In this context, the Ninth Circuit found that questioning Ms. Mena about her immigration status and searching her purse were among many factors that rendered the detention unreasonable. Pet. App. 10a-14a. The court did not rule that her questioning amounted to a separate unconstitutional violation.

In this case, it is particularly inappropriate for this Court to reach the issue of whether the questioning of Ms. Mena is an independent violation of the Fourth Amendment. If this Court affirms the court of appeal's conclusion that Ms. Mena was impermissibly detained and that the officers are not protected by qualified immunity, then anything that the Court says about the legality of the questioning is just dicta and, indeed, an impermissible advisory opinion. The jury's verdict will be upheld in its entirety as it was based solely on the grounds that the manner in which this detention was conducted exceeded what is permitted under *Michigan v. Summers* and not on the

grounds that the questioning about Ms. Mena's immigration status was a separate Fourth Amendment violation. The Court's opinion on the questioning issue would make no difference in the outcome of the case and thus would be an advisory opinion barred by Article III. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) (advisory opinions have been "disapproved by this Court from the beginning," citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (U.S. 1792)).

Moreover, if the Court finds that Ms. Mena's detention was illegal, then it is clearly established that her questioning also was illegal. *See, e.g., Dunaway,* 422 U.S. at 216-218; *Brown v. Illinois,* 422 U.S. at 601-605 (questioning following illegal arrest violates the Fourth Amendment and requires exclusion of confessions obtained). For this reason, too, if the Court finds that Ms. Mena was detained in violation of the Fourth Amendment, there is no issue of whether her questioning independently violated the Constitution.

On the other hand, if the Court concludes that Ms. Mena's detention did not violate the Fourth Amendment, the Court still should not reach the issue of whether questioning Ms. Mena about her immigration status independently violated the Constitution. Because this issue was not raised at trial or presented to the jury, the facts relevant to these issues were not fully developed. For example, petitioners maintain that the Fourth Amendment was not violated by the questioning "provided that questioning does not extend the length of the detention or indicate that the detainee's freedom is contingent on answers to those questions." Pet. Br. at 23. In other words, petitioners concede that questioning Ms. Mena about her immigration status violated the Fourth Amendment if either it lengthened the detention or the police indicated that Ms. Mena's freedom was contingent on her answers. But these issues were never specifically dealt with at trial. Thus, while

there is evidence which supports the conclusion that the questioning extended the time of the search and that Ms. Mena's freedom was dependent upon her answering the questions (*See Section II(B)(1)*), the record is incomplete. This Court should exercise its discretion and decline to decide these important issues on an incomplete record.[26]

However this Court resolves the issue of whether Ms. Mena's detention violates the Fourth Amendment, this case is not the proper vehicle for addressing whether questioning a detained individual raises a separate Fourth Amendment issue. Although this Court granted certiorari on the issue of whether the police questioning violated the Fourth Amendment, the Court should dismiss as certiorari having been improvidently granted on that question.

B. The Questioning of Ms. Mena About Her Immigration Status Without Reasonable Suspicion Violated The Fourth Amendment.

1. Reasonable Suspicion Was Required In Order For Ms. Mena to be Lawfully Questioned About Her Immigration and Citizenship Status.

Petitioners and the United States, as *amicus curiae*, misstate the issue. The question is not, as they assert, whether mere questioning is itself a violation of the Fourth Amendment. Petitioners and the United States frame the issue in this manner in order to convince this Court that petitioners were not

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[26]For additional reasons not to reach this issue, see the amicus briefs of the 1) American Civil Liberties Union ("ACLU") and 2) the National Latino Officers Association ("NLOA"), National Black Police Association ("NBPA"), and Hispanic American Police Command Officers Association ("HAPCOA").

required to have a reasonable suspicion to question Ms. Mena about her immigration and citizenship status.

But what petitioners ignore is that the issue here is much more specific: Is the questioning of a suspect detained in her home about a matter unrelated to the reason why she was detained, without reasonable suspicion, and under intimidating an coercive circumstances, a violation of the Fourth Amendment? None of the cases cited by petitioners and their *amicus* address this issue.

Indeed, contrary to petitioners' assertion and that of the United States (Pet. Br. at 17, United States Br. 22-23), this is not a case about the ability of the police to ask a question of a person on the street. Pet. Br. at 17. *See United States v. Drayton*, 536 U.S. 194, 200-201 (2002). Petitioners' and the United States' reliance on this Court's cases concerning questioning by law enforcement of individuals on the street or elsewhere in public essentially ask this Court to ignore the real context in which the questioning of Ms. Mena took place. But the actual context in which Ms. Mena was questioned is central to determining the lawfulness of the questioning in this case.

First, the questioning of Ms. Mena took place in her home, not on the street, the workplace, a bus, or any other public location for that matter. Not a single case cited by petitioners concerns questioning a person in his or her home. This Court has emphasized that the text and history of the Fourth Amendment create special protection for people in their homes. *See Kyllo,* 533 U.S. at 31.[27] Indeed, in the immigration context, the Court has said that police actions without

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[27]The *Kyllo* court quoted from *Silverman v. United States,* 365 U.S. 505, 511 (1961), when stating "'[a[t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his home and there be free from unreasonable government intrusion.'" *Kyllo*, 533 U.S. at 31; *Accord Payton v. New York*, 445 U.S. 573, 590 (1980) (Fourth Amendment draws "a firm line at the entrance to the house").

reasonable suspicion are different when "we deal neither with searches nor with the sanctity of private dwellings." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

Second, although the record on this issue was admittedly not fully developed, there is a great deal of evidence which supports the conclusion that the questioning of Ms. Mena took place under coercive conditions which conveyed to Ms. Mena that she was not free to ignore the officers' questions. As detailed above, the detention of Ms. Mena was the functional equivalent of an arrest and far exceeded the authority this Court granted law enforcement in *Summers* to detain occupants during a search. Ms. Mena was awoken on the morning of the search by an officer dressed in black who pointed a machine gun in her face. Ms. Mena was handcuffed in a rough manner, and led out in the pouring rain into the garage where she remained in handcuffs, watched by armed guards, for 2-3 hours, including being detained in handcuffs after the search concluded. During this entire time, no one ever informed Ms. Mena why she was being detained and what the officers' purpose for being there was. In fact, the officers refused to provide Ms. Mena with an explanation as to what was occurring despite her requests for an explanation.

These circumstances alone suggest an extremely coercive environment where Ms. Mena would not reasonably feel that she was free to ignore the officers' questions about her immigration and citizenship status. Indeed, because the officers did not indicate until after the search why they were there, for all Ms. Mena knew, the officers may have been there for the sole purpose of apprehending illegal aliens and finding proof of their illegal status.

The conclusion that the questioning took place under coercive conditions is bolstered by the fact that one of the occupants of the home was actually taken into custody by virtue of answers he provided about his immigration status.

Moreover, neither petitioners nor the United States deny that had Ms. Mena been silent in response to questions about her immigration status, she likely would have been arrested for immigration violations. Simply put, when, as here, a person is detained in handcuffs in his or her home, any questioning is inherently coercive and any reasonable person would believe that his or her release depended on answering the police questions. Thus, the record which is before this Court requires a finding that Ms. Mena's freedom was contingent upon her answering the questions posed to her by the officers.

Petitioners concede that questioning without reasonable suspicion which conveys that the person's freedom is contingent his or her answers is impermissible. Pet. Br. 18, 23. Petitioners must make this concession in light of this Court's precedent. For instance, in a case petitioners rely heavily upon, *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984), this Court held that questioning becomes a Fourth Amendment detention when "the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed that he was not free to leave if he had not responded."

The record before this Court also suggests that the questioning of Ms. Mena and the other occupants extended the duration of the detention. If the officers were not preoccupied with questioning Ms. Mena and the other occupants about their immigration status, as well as searching for proof of their citizenship, they could have assisted in the search and shortened the time of the search and consequently the length of the detention. Petitioners admit that the "outcome may be different if the questioning extends the length of detention." Pet. Br. at 18.

However, whether the questioning extends the duration of the detention or is coercive are not the only relevant inquiries in terms of assessing the reasonableness of the questioning. Petitioners' position in this regard contradicts the long line of

cases from this Court which hold that seizures made on less than probable cause must be limited in both duration and *scope*. *See, e.g., Royer, supra*, 460 U.S. at 500; *United States v. Hensley*, 469 U.S. 221, 235 (1985) (permissibility of *Terry* stop turns on "length and intrusiveness").

As demonstrated above, the scope of a seizure made on less than probable cause must be directly related to its justification. In *Summers*, the justifications articulated by this Court related to the execution of the warrant itself (officer safety, prevent flight, facilitate orderly completion of the search). Neither petitioners or the United States argue that questioning Ms. Mena about her immigration status was in any way related to these concerns, nor could they. *Summers* simply does not provide petitioners with the authority to conduct the interrogation of Ms. Mena that occurred, and therefore some independent justification is required. As such, this is an additional reason why reasonable suspicion was needed in order for the questioning of Ms. Mena to be permissible.

Petitioners assert that the "boundary between questions that are permissibly 'related' to the basis of detention and those that are unconstitutionally 'unrelated' often will be unclear." Pet. Br. at 21. But this Court often has drawn exactly that line, requiring that questioning be related to the purpose of the stop or search. In fact, in the immigration context, this Court explained that "the stop and inquiry must be reasonably related to the justification for their initiation. The officer may ask the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention must be based on consent or probable cause." *United States v. Brignoni-Ponce*, 422 U.S. at 881-882.

Ultimately, adopting petitioners' position would allow law enforcement officers to use *Summers* detentions in order to conduct custodial interrogations of individuals about their

immigration status where they would otherwise have no authority to do so. But if the officers would not be entitled to seize a person for the purpose of subjecting him to custodial questioning about his immigration status, they certainly should not be allowed to do this as a consequence of this Court's concern in *Summers* about officer safety, preventing flight and facilitating an orderly search.[28] Accordingly, unless the questioning of Ms. Mena about her immigration status was based on a reasonable suspicion, it was unlawful.

2. There Was No Reasonable Suspicion to Question Ms. Mena About Her Immigration and Citizenship Status.

Petitioners argue that there was reasonable suspicion that Ms. Mena was an illegal immigrant. Petitioners point to two factors, neither of which provides a basis for finding reasonable suspicion. Petitioners say that she was Latina, "English was not respondent's first language, and she spoke with a noticeable Salvadorian accent." Pet. Br. at 24. But this Court has been clear that race alone does not justify stopping and questioning a person. *United States v. Brignoni-Ponce*, 422 U.S. at 885. Petitioners' argument is that there is reasonable suspicion that anyone who is Hispanic in appearance and speaks with an accent is illegally present in the United States.

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[28]Contrary to the assertion made in the United States *amicus* (U.S. Br. at 26), ruling that the questioning of Ms. Mena was a factor that rendered her detention unreasonable will not hamper the ability of government officials to elicit voluntary responses from individuals about their immigration status. The government is free to question individuals whom they encounter in public about their immigration status, so long as the questioning is not unduly coercive. Ruling in respondent's favor will not change this fact.

Thankfully, that is not and hopefully never will be the law in this country.

The other factor pointed to by petitioners is that Ms. Mena lived in a house where there was a gang member and that it was a gang that included illegal immigrants. Pet. Br. at 23-24. But as petitioners point out in their Statement of the Case, the police knew before the search that this was a home where a number of individuals rented space. Pet. Br. at 4. The police had no basis whatsoever for believing that Ms. Mena was affiliated with the gang. The fact that she happened to live in a house where a suspected gang member rented space does not provide the slightest basis for suspecting her of anything impermissible. As this Court expressed in *Ybarra v. Illinois,* 444 U.S. at 91: "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *See also Sibron v. New York*, 392 U.S. at 62. Suspecting Ms. Mena because she lived with her parents on a property where a suspected gang member rented space is nothing but guilt by loose association and has no place in our criminal justice system. *See United States v. Lane,* 474 U.S. 438, 475 (1985)

3. Petitioners Are Not Entitled to Qualified Immunity.

Finally, petitioners argue that the actions of the officers are protected by qualified immunity. The issue, of course, is "whether the right that was transgressed was 'clearly established' – that is, 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Groh,* 124 S.Ct. at 1293 (citations omitted). As described above, the law is clear that questioning which is unduly coercive or that lengthens the detention violates the Fourth Amendment. The law is also clear that questions to a

detainee seized on less than probable cause must relate to justifications for the seizure in the first place. Moreover, the law is clear: this Court has held that "the Fourth Amendment . . . forbids stopping or detaining persons for questions about their citizenship on less than a reasonable suspicion that they are aliens." *United States v. Brignoni-Ponce*, 422 U.S. at 884. This is exactly what occurred in this case and thus the officers properly were denied qualified immunity. As this Court explained, "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 557 U.S. 800, 818-19 (1982).

CONCLUSION

The judgment below should be affirmed.

Dated: November 3, 2004 Respectfully submitted,

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